fered by his victim, affords no reason for denying to the latter the right to elect an action for restitution instead of an action for damages. As to the second, it may be pointed out that the plaintiff, in electing to sue for restitution, does not separate the consequential benefit to the defendant from the wrong committed by him. The very foundation of the action for restitution is the fraud of the defendant in inducing the plaintiff to enter into the void marriage; and the only essential difference between the action of assumpsit and that of deceit in such a case, is that in the former the plaintiff seeks to recover the value of the benefits resulting to the defendant, while in the latter he demands compensation for the damages resulting to himself."

It naturally follows that the value of all benefits conferred upon the plaintiff by the wrongdoer must be deducted from the value of the services rendered by the plaintiff, for the retention of a benefit is not unjust to the extent that such services have been paid for. The benefits conferred upon a plaintiff might be in some cases so great as to prevent any recovery for services. It should be noted in this connection that it is no more difficult for the jury to make the deduction when the action is in assumpsit than it is where the action is in tort for deceit. H. G. G.

AESTHETIC PURPOSE AS A JUSTIFICATION FOR EXERCISE OF POLICE POWER.—Whether or not aesthetic considerations justify the exercise of the police power is a question which has already engaged the minds of the courts, and which we venture to say will more frequently be involved in their opinions as time passes. The recent case of *Thomas Cusack Co.* v. *Chicago,* 37 Sup. Ct. 190, sustained the constitutionality of the following ordinance of the city of Chicago: "It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block or any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed, or located." The same decision had been reached by the Supreme Court of the State of Illinois, *Thomas Cusack Co.* v. *City of Chicago,* 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916 C 488. In that opinion, wherein the ordinance is upheld as a reasonable exercise of police power, the court is careful to distinguish the facts from those involved in *Haller Sign Works* v. *Physical Culture School,* 249 Ill. 436, 94 N. E. 920, 34 L. R. A. N. S. 998. The statute in the latter case was held to have no relation to the safety, health, morals or general welfare of the public but to have been passed solely from aesthetic considerations, and was therefore considered invalid.

The Federal Supreme Court in its decision does not find it necessary to discuss the effect that it would give a statute which had been passed out of regard for aesthetic purposes, but adopts the finding of the state court that "fires had been started in the accumulation of combustible material

which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals." It is apparent however that these are not the only objections to billboards; they form convenient arguments for sustaining the validity of regulations passed under the police power, as a relation can be shown between the purpose of such statutes and the "health, morals, and safety of the public." If the ordinance in question had also provided, as is done in some cities, that billboards must be constructed of sheet-iron or some other non-inflammable materials, and that there must be a space of at least four feet between the lower edge and the ground (*St. Louis Gunning Advertising Co.* v. *St. Louis,* 235 Mo. 99, 137 S. W. 929) there would then be little danger from fire, the accumulation of waste matter would be lessened, and the danger of the use of such billboards as a scene of immoral practices and as a hiding place for criminals would be eliminated. The Federal Supreme Court would have then been called upon to determine whether the police power may be constitutionally exercised in the restraint of acts offensive to the aesthetic sense—a question which as yet it has not found necessary to decide. However conveniently and satisfactorily the decision may have been reached on the grounds assigned in the opinion, it would seem that the purpose prompting the passing of this ordinance was not so much the protection of adjoining owners from fires, criminals, etc., but rather to give them the power to refuse to permit billboards to be erected in close proximity to their residences if they found that such billboards were eyesores and as such impaired the enjoyment of their property or lessened the market value of the same.

The authorities on this question seem to be almost unanimous in holding that aesthetic considerations alone will not justify the exercise of the police power. *State* v. *Whitlock,* 149 N. C. 542, 63 S. E. 123, 128 Am. St. Rep. 670; *People ex rel. Wineburgh Adv. Co.* v. *Murphy,* 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. N. S. 735 with case-note; *Haller Sign Co.* v. *Physical Culture School,* 249 Ill. 436, 94 N. E. 920, 34 L. R. A. N. S. 998 with case-note.

The authorities are also clear on the proposition that private property cannot be taken under the power of eminent domain if the only public purpose is an aesthetic one. Where a harbor line was established solely in order that an expensive and sightly bridge might not be hidden from view by buildings placed on each side of it, the court held that this was not a public purpose for which lands could be taken. *Farut Steel Co.* v. *Bridgeport,* 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. Massachusetts passed a statute limiting the height of buildings in the neighborhood of Copley Square in Boston to ninety feet, but it was provided that compensation should be made to all those sustaining damages to their property by reason of the limitation of height of buildings prescribed by the act. The court in sustaining the statute stated: "It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land

against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that this was a matter of such public interest as to call for an expendiure of public money, and to justify the taking of private property." The power of eminent domain cannot be used for a private purpose, and "if the statute is merely for benefit of individual property owners," proposing to use the public funds to limit the height of adjacent buildings and thus increase the value of private property, it would unquestionably be an improper use of the power of eminent domain. See *Welsh* v. *Swasey,* 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. N. S. 1160, affirmed in 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923; *Commonwealth* v. *Boston Adv. Co.,* 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494.

Taxes levied to secure funds for the erection of art museums, monuments, fountains, ornamental arches, and other purposes that would appeal only to the aesthetic sense have been upheld. If the object to be thus accomplished is considered so essentially public as to justify the exercise of the taxing power of the state, why could not it also be said that private property is taken for a *public* purpose, and therefore it may be condemned through the exercise of eminent domain, where the purpose of taking is "to preserve the architectural symmetry of Copley Square?"

To recur again to the question of whether or not under the police power a state might forbid objectionable billboards solely through the fact that they are offensive to the aesthetic sense, it will require no citation of cases to demonstrate the fact that an ordinance is consitutional which so limits my neighbor's right to use his property as not to offend my sense of hearing, e. g., an ordinance prohibiting manufacturing plants in a residence district; likewise an ordinance which protects my sense of smell, e. g., a prohibition against the location of a livery-stable within a residence-block; my sense of taste is also protected, e. g., an upper riparian owner cannot so pollute the water as to make it less fit for my use when it shall have descended to me. Inasmuch as property in a *res* is not an absolute right to use the *res* in any conceivable way, but a right to its use only in conformity with what is regarded as proper and reasonable under the limits fixed for us by our compact with society, why cannot society just as it has protected our sense of hearing, smell and taste, also guard our sense of sight from being disturbed by scenes that are as offensive to the eye as the forbidden noises are to the ear? FREUND, POLICE POWER, 182. The application of the maxim, "Sic utere tuo, ut alienum non laedas," is gradually but surely being extended, and restraints on the use of property are now being submitted to without question which formerly might have been successfully opposed as a deprivation of property without due process. As civilization advances, the social compact must bring us into a closer relation one with another and our rights must become more and more limited as they will more and more come in conflict with equal or higher rights of our neighbor. With the

progress of the people in education and refinement we may expect the appreciation of the beautiful to be increased, and we can agree with the view taken by the Massachusetts court in a later decision: "It may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the Fine Arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes." *Cochran* v. *Preston,* 108 Md. 220, 23 L. R. A. N. S. 1163, 129 Am. St. Rep. 432, 70 Atl. 113, 15 A. & E. Ann. Cas. 1048. The weight of authority, however, as well as the decision in that case, is opposed to permitting the exercise of the police power in restraint of the use of property upon mere aesthetic considerations, and until public opinion has changed so as to support or demand such a decision, we may expect the courts to hold that the owner's right to use his land for the erection of billboards is more to be protected than his neighbor's right to a view unimpaired by such ogstructions. W. L. O.

WHEN REMAINDERS ARE VESTED AND WHEN CONTINGENT.—A settlement was made upon C for life, then upon Ch C for life, and thereafter to the use "of the eldest son of the said C, wife of the said Ch C, who shall be living at the time of the decease of the survivor of them, the said C and Ch C" for life, and "from and after the decease of such eldest son, to the use and behoof of the next eldest son * * * who shall be living at the time of the decease of the son so dying." *Held*: That the sons of C took, under the settlement, successive vested estates for life and not contingent life estates, and that, accordingly, the limitations to such sons were not void for violating the rule against perpetuities. *In re Barbre's Settlement,* 85 L. J. Ch. 683.

There is a well known rule of law that if possible all remainders will be regarded as vested rather than contingent. *Webb* v. *Hearing,* Cro. Jac. 415. This rule or policy undoubtedly influenced this court in deciding the instant case as it did, and the only proper inquiry is whether it so influenced the court that the decision contravenes other and more definite rules of law. It has been said that "a remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine; a remainder is contingent, if, in order for it to come into possession, the full fillment of some condition precedent other than the determination of the preceding freehold estates is necessary." GRAY, RULE AGAINST PERPETUTIES. (3rd. Ed.) §101. This condition precedent, other than the determination of the preceding freehold estates, which must be fulfilled before a contingent estate becomes vested, may be either the ascertainment of who is to be the remainder-man, or the happening of an event which must transpire before there be any possibility of the contingent remainder coming into possession should the preceding freehold estate cease. In other words an uncertainty of (1) person or (2) event may make the remainder contingent. *Doe. d.*